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# Supreme Court of the United States

October Term, 1951

## No. [redacted] 79

SIDNEY J. MASSICOT, ROBERT R. LIRETTE and JAMES F. DONNELLY
Petitioners

versus

UNITED STATES OF AMERICA
Respondent

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No.

SIDNEY J. MASSICOT, ROBERT R. LIRETTE and JAMES F. DONNELLY

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versus

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Sidney J. Massicot, Robert R. Lirette and James F. Donnelly, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 7, 1958.

## CITATIONS TO OPINIONS BELOW

The verdict of the jury in the United States District Court for the Eastern District of Louisiana was reviewed by the United States Court of Appeals for the Fifth Circuit and judgment herein was rendered by a divided court on April

7, 1958. Rehearing was denied May 8, 1958. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, infra, P. 25 is reported in 253 F. 2d . . .

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

## QUESTIONS PRESENTED

1. The Court of Appeals for the Fifth Circuit has held 47 U.S.C. 605 defines a crime under the laws of the United States. The questions presented are:

A) Does 47 U. S. C. 605 describe a crime against the United States, or does it merely define a rule of Federal procedure or evidence?

B) Does the interception and divulgence of an intrastate telephone conversation between two persons constitute a crime against the United States?

2. Since the Fifth Circuit Court of Appeals found that ". . . the government attorney did overstep the bounds of propriety . . ." by making public utterances quoted in the press, radio and television of information ruled inadmissible in the trial.

A) Was the prejudicial effect of the impropriety overcome by cautionary instructions of the Judge so as to warrant denial of a mistrial or a new trial?

B) In view of the established rule that a jury cannot impeach its own verdict, can ex-jurors properly be called to testify as government or court witnesses for the purpose of establishing the purity of their verdict of conviction.

C) Where ex-jurors are called as government or court witnesses for the purpose of establishing the purity of their verdict of conviction, can the defendants properly be denied the right to cross examine such witnesses?

3. Can a conviction stand based upon an unsigned confession which is in fact contradicted by the concomitant notes taken by the agents of the Federal Bureau of Investigation who obtained the alleged confession?

## STATUTE INVOLVED

The statute involved is the second clause of Section 605 of the Federal Communications Act, 47 U. S. C. 605. The complete section is printed in Appendix B., infra pp. 40.

## STATEMENT

Petitioners, Sidney J. Massicot, Robert R. Lirette, and James F. Donnelly, were tried, convicted, and sentenced on three counts of a five-count indictment charging them with certain violations of the Federal Communications Act, 47 U. S. C. 605 in that they did wilfully and knowingly and without authority of the sender intercept and cause and suf-

fer to be intercepted certain telephone communications by and between de Lesseps S. Morrison and other named persons, and did divulge and publish and cause and suffer to be divulged and published to one or more persons the existence, contents, substance, purport, effect and meaning of the said telephone communications.

Petitioners were indicted on July 12, 1956, for the offense which allegedly occurred "during the period from January 15, 1956, to about January 19, 1956." The interception is alleged to have occurred on January 17, 1956. The divulgence is alleged to have occurred on January 19, 1956.

On September 20, 1956, the petitioners filed a motion to dismiss the indictment which alleged inter alia: That the statutory provision under which the accused are charged does not describe an offense against the United States but merely defines a rule of federal procedure. Thereafter on October 19, 1956, the Trial Court denied the motions.

On January 28, 1956, trial of the petitioners began and continued thereafter through January 30, 1956. At the termination of the government's case petitioners filed a motion for acquittal, which in essence alleged that the record established herein was devoid of evidence tending to prove that anyone of the three defendants had performed both of the essential elements of the crime alleged — that is the interception and divulgence of a communication. This motion was denied. (R.411) This motion was again denied at the termination of the entire case.

Also at the termination of the case before the deliberation of the jury began, counsel for the defendants filed a motion

for a mistrial based on alleged prejudice to the interests of the petitioners, Massicot and Lirette, which occurred when the government prosecutor was quoted in public press, radio and television news broadcasts to the effect that a statement of one accused (Donnelly) "definitely implicated" all three petitioners. The motion for mistrial was denied. (R 420).

On January 30, 1957, the petit jury returned the following verdict:

> "We, the Jury, find the Defendants, Sidney J. Massicot, Robert Raymond Lirette, and James F. Donnelly, guilty as charged on Counts 2, 3, and 4, with recommendation of leniency."

On February 5-6, 1957, the petitioners filed a motion, and a supplemental motion for a new trial which reurged all of the errors previously noted, and alleged the existence of newly discovered evidence in the form of further radio and television publication during the trial of the statement of the government prosecutor to the effect that the confession of one accused "definitely implicated" all three defendants.

A hearing was held on these motions on February 13, 1957. The petitioners submitted the aforesaid motion on a stipulation of facts mutually agreed to by both counsel. Thereafter the former jury members were called as witnesses and interrogated by the Trial Court as to matters raised by petitioners' motion. Petitioners thereafter objected to the refusal of the Trial Court to permit petitioners' cross-examination of these witnesses. The motions for new trial were denied.

On 13 February 1957 the Trial Judge, despite the petit jury's recommendation of leniency and despite the fact that these men are all middle-aged, of good reputation, and one a one hundred per cent disabled war veteran, imposed on all three petitioners a sentence of imprisonment for one year on all counts. These sentences were to run concurrently, and in addition thereto the petitioner Massicot was ordered to pay a fine of $10,000.00.

On February 15, 1957, petitioners filed a motion in arrest of judgment which in substance alleged that 47 U. S. C. 605 and the indictment herein were unconstitutional when applied to a purely intrastate telephone conversation.

The motion in arrest of judgment was denied February 28, 1957.

The appeal of petitioners to the Fifth Circuit Court of Appeals was denied on April 7, 1958, by a divided court. On May 8, 1958, a rehearing was denied.

## REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Fifth Circuit has here decided an important question of federal law that has not previously been settled by this Court. They have determined that the interception and divulgence of a telephone conversation had between two person wholly and entirely within one state constitutes a crime against the United States.

Petitioners acknowledge decisions that say 47 U. S. C. 605 defines a crime, and decisions that say 47 U. S. C. 605 mere-

ly states a rule of evidence. However petitioners believe it is in the public interest that this Honorable Court accept this opportunity to dispel some of the confusion generally held by a public which mistakenly calls this statute the "Wiretapping Law."

Petitioners must agree with popular and well held opinion that the statute is vague and indefinite. (The Honorable William P. Rogers, then Deputy Attorney General of the United States testifying before the House Sub-Committee Number Three on Judiciary in 1953 referred to Section 605 as "nebulous." The author of 52 Michigan Law Review 430, et seq., refers to the same law as "mysterious.") Here, however is the all important analysis. Of all the cases that hold Section 605 to be a rule of evidence each and every one of them did in fact rule that certain evidence was *admissible* or *inadmissible* under the authority of the statute. Now of all the cases that refer to Section 605 as the definition of a crime, only one has sustained a conviction for interception and divulgence of a telephone communication. United States v. Gruber, 123 F. 2d 307. But, even that case does not definitely state that a person can be indicted, tried and convicted for the intra state interception and divulgence of a telephone communication between two persons in the same state. For, the Gruber case was a prosecution for a conspiracy to defraud the government and not a prosecution for interception and divulgence of telephone conversations. A broad view of the Gruber prosecution definitely indicates that the interception and divulgence of the telephone message was no more than an allegation of the commission of an overt act committed in furtherance of the conspiracy to defraud.

Further comprehension of the scope and purpose of this statute may be derived from the simple fact that it has been employed as a rule of evidence more than a thousand times and that in so far as reported cases are concerned, the undersigned has found only the Gruber case, supra, possibly considers the statute to be one of substantive laws defining a crime against the United States.

The case of Sablowsky v. United States, 101 F. 2d 183 states that the second and fourth clauses of Section 605 do not relate to the regulation of communication carriers and constitute a rule of evidence. The fact that the second clause of this section (the indictment herein is drawn under this section) was merely a rule of evidence was reiterated in a case prosecuted by the Honorable Earl Warren, then Attorney General of California. People v. Kelly, 122 P. 2d 655, 137 P. 2d (1) appeal dismissed 64 S. St. 264, 320 U. S. 715, 88 L. Ed. 42, rehearing denied 64 S. Ct. 527, 321 U. S. 802, 88 L. Ed. 1089. As a matter of fact this Kelly case like the Sablowsky case, held both the second and fourth clauses of 47 U. S. C. 605 were rules of evidence.

Petitioners here note that several cases have referred to 47 U. S. C. as a penal statute, however only the case of Rathbun v. United States, 335 U. S. 107; 2 L. Ed. 139; 78 S. Ct. 145 is here analyzed, for the Court below held that the Rathbun case was "destructive" of the theory that the statute in question defined a rule of evidence rather than a crime.

Counsel for petitioners acknowledge that the Rathbun case did state that ". . . 605 is penal in nature . . .", however the analysis of this opinion will show that this statement

was not necessary to the determination of the case, and in fact forms no part of the rule of law therein enunciated. Rathbun was charged with transmitting an interstate communication which threatened the life of another. Petitioners were prosecuted for the violation of that section of the Federal Communications Act of 1934 which prohibits the interception and divulgence of "any communication." The sole determination made in the Rathbun case was as to the admissibility of evidence received by a so called intercepted telephonic communication. More specifically, someone who had been once threatened by means of a telephone call suspected that another threat would follow, and consequently he invited members of the local police department to listen in on a regularly installed telephone extension. The second threat was subsequently made and overheard by the police officers. Thereafter in a prosecution for the violation of 18 U. S. C. 875 (b), (c), (not 47 U. S. C. 605 as we have here) the question arose as to whether or not these police officers would be allowed to testify as to what they overheard on the telephone extension. The majority of the Court held that these police officers, in the trial of Rathbun for the interstate communication of a threat to the life of another, could testify that they overheard these threats being made to the supposed victim while listening in on the extension telephone.

Hence, the very case cited by this Court as "destructive" of the contention of petitioners to the effect that 47 U. S. C. 605 merely states a rule of evidence rather than a crime, is in fact a positive application of the use of 47 U. S. C. 605 as a rule of evidence. The Court examined the evidence in this case and under the authority of 47 U. S. C. 605 decided the

alleged intercepted message would be admissible in evidence.

It must therefore be concluded that the statement in the Rathbun decision to the effect that ". . . 605 is penal in nature . . ." is merely a gratuitous statement unnecessary for the determination of the issues there presented and that in the Rathbun case the Supreme Court of the United States interpreted 47 U. S. C. 605 and found it to be legislation designed for the purpose of determining whether or not a particular bit of evidence was admissible, thus substantiating the contention of petitioners to the effect that 47 U. S. C. 605 is a rule of evidence.

The question of whether or not the interception and divulgence of telephone conversations between two persons within one state constitutes a crime against the United States has been properly raised by the Motion to Dismiss which alleged that the indictment under which the accused were charged does not describe a crime against the United States.

The Communications Act of 1934 begins with the statement it is for the purpose of regulating "interstate and foreign commerce" in wire and radio communications (47 U. S. C. 151). Thereafter the act repeatedly includes specifications limiting its application to "interstate and foreign communications". The one inconsistent exception is Section 605 wherein "any communication" is used without qualification.

Other sections of the act limit its scope to "interstate and foreign communications". (See Sections 152 (a), 152 (b),

221 (a), 301, 503). All of these provisions were part of the Communications Act prior to the case of Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298, which case prima facie seems to destroy this argument when one reads the syllabus thereto which says, "Intrastate as well as interstate messages are within the interdiction of Section 605 of the Federal Communications Act of 1934." However, a closer analysis of Section 605 reveals that perhaps it is merely a rule of federal procedure. Interdiction does not necessarily include criminal responsibility and it may refer only to an exclusionary rule of evidence that could be enacted without the authority of the interstate commerce clause of the Federal Constitution. The general supervisory and administrative authority to prescribe rules of Federal procedure does not give the Federal government the right to define this crime, but it does confer the right to prescribe evidentiary rules and procedure. Therefore, if Section 605 defines a crime, it must do so under the authority of the interstate commerce clause. So, if Section 605 defines the crime of intercepting and divulging communications, then those communications must be "interstate" communications.

How then did the inconsistent phrase "any communication" get into Section 605 without the qualifying words "interstate or foreign." The answer is, it got there inadvertently when the clause in which it appears was lifted and re-enacted, almost verbatim, from the old Radio Act of 1927, which prohibited the interception and divulgence of "any message," i.e. any radio message. When re-enacted in the Communications Act, which pertained not only to radio but also to telephone communications, the drafters of the bill probably did not realize that there is an inherent and significant difference between radio and telephone messages, in

that the former are all necessarily interstate, whereas the latter can be categorized as either interstate or intrastate. In the old Radio Act, Congress had supposed that all radio messages would necessarily be interstate, and so it would have been superfluous to say "interstate" radio message; it would have been like saying, wet water. For as the Court said in Whitehurst v. Grimes, D. C. 21 F. Supp. 2d 787; "Radio communications are all interstate. This is so, although they may be intended only for intrastate transmission."

Research into the legislative history of the Communications Act of 1934 will disclose that on the floor of Congress Senator Dill stated:

> "Title V is the penal section, and combines the provisions of the Interstate Commerce Act and of the Radio Act as to penalties and forfeitures . . ."
> (Cong. Record for May 15, 1934, p. 8826.)

A reading of the Old Radio Act of 1927, which follows, and comparison of it with Section 605 of the Communications Act of 1934, will show how Congress, without intending to do so inadvertently allowed the phrase "any communications" to be enacted into law without the qualifying words "interstate or foreign."

> Radio Act of 1927, Feb. 23, 1927,
> c. 169 Sec. 27, 44 Stat. 1172
>
> "No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of

> transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept *any message* and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; . . ."

Since the phrase "any communication" in Section 605 is inconsistent with the rest of Section 605, and is inconsistent with the many specific instances throughout the entire act where Congress explicitly confined Federal control to interstate and foreign communications; and since it has been shown here how the combining of radio and telephone transactions into a single penalty section could have resulted in the inadvertent omission of the qualifying words "interstate or foreign" from the challenged clause of Section 605, the petitioners respectfully submit that if 47 U. S. C. 605 was intended to be a rule of evidence or procedure it may well apply to intra as well as interstate or "any communication," for obviously the Federal courts have the right to determine the proper administrative and evidentiary procedures for proper judicial determination. However, if the intent of Congress was to define a crime, then constitutionally it could do so only under the authority of the commerce clause

of the federal Constitution. And, the crime must necessarily relate to interstate communications.

2. The Government Prosecutor committed reversible error during the course of this trial by widely circulated public statements to the effect that the statement of Donnelly ". . . definitely involved the other two defendants, Sidney J. Massicott, operator of the United Detective Agency, and Robert R. Lirette, an employee of the agency." After the impropitious comment of the prosecutor, which occurred on the second day of the three-day trial, the issue was raised by a motion for mistrial which was denied; and, again raised by the supplement of additional evidence in a Motion for a New Trial.

During the course of the trial a motion for a mistrial was urged based upon the prejudicial statements of the prosecutor. At this time the Judge questioned the jurors as to whether or not they had read or heard of the statements of the prosecutor. None acknowledged any prejudicial effect. Petitioners submit there is some question as to whether or not the Jurors' "show of hands" or failure to respond constitutes "sworn" testimony. Then, in the trial of a motion for a new trial additional evidence was developed as to further publication of the statements attributed to the government prosecutor by means of radio and television. Admittedly this time the jurors were sworn as witnesses. At this time they were questioned by the judge alone. Despite the fact that the jurors had long since been discharged and were now being called as witnesses, the trial judge denied counsel for the petitioners the right to cross-examine these witnesses.

The Court, in holding that the trial judge did not abuse his discretion in denying motions for mistrial and for new trial because of prejudicial publicity engendered by the prosecutor, cited and relied upon the following cases: Shushan v. United States, 5 Cir., 1940, 117 F. 2d 110; United States v. Carruthers, 7 Cir., 1945, 152 F. 2d 512; Reining v. United States, 5 Cir., 167 F. 2d 362, cert. den. 335 U. S. 830.

Petitioners here note that the above-cited cases are not applicable, because therein the prejudice to the accused was less than in the instant case. The Shushan, Carruthers, and Reining decisions, supra, possibly went too far, as was pointedly suggested by the United States Court of Appeals for the First Circuit in a more recent case, viz., Delaney v. United States, 1 Cir., 1952, 199 F. 2d 107. In reversing Delaney's conviction the Court of Appeals stated that appellate courts sometimes "overstrained" to uphold discretionary determination of lack of prejudice in similar cases, and as an example of overstrained effort the court specifically mentioned the Shushan case, supra.

Petitioners will not attempt an analysis of other cases in which prejudicial utterances have been considered by the Courts. Careful scrutiny is respectfully requested for the petitioners' exhibit of a daily newspaper printed during the trial wherein on Page one in blatant headlines, the world was informed of a:

"CONFESSION IN WIRETAP"

followed by a lead paragraph which declared the confession:

"IMPLICATES ALL THREE DEFENDANTS",
which in turn is followed by a third paragraph quoting the government prosecutor as saying that the confession:

"DEFINITELY INVOLVED"
the other two accused who should be protected by law from incrimination by confessions made by another. (Defense Exhibit Three)

The fact that it was highly improper for the prosecutor to release the contraband information here complained of to the press, does not seem to be questioned either by the Government or the Court. The United States Attorney in opposing the motion for new trial, categorized the prosecutor's comment as "this unfortunate statement". The trial judge when informed of what happened, spontaneously stated: "What is happening here now shows how very foolish it is for public officials to talk to newspapermen about a case on trial." And the Court below recognized in its majority opinion that "the Government attorney did overstep the bounds of proper conduct" in making the contraband information available to the public.

It is immaterial whether the prosecutor's act was deliberate or inadvertent. The important thing is that "this unfortunate statement" was made by a prosecuting official. The Courts recognize that prejudicial publicity instigated by the government — particularly by the prosecuting officials— will require reversal more readily than if its source lay only in the mind of a city editor. Delaney v. United States, 119 F. 2d 113.

In cases of improper publicity, especially where it is instigated or engendered, either deliberately or inadvertently, by the prosecutor, the federal courts have assumed the existence of prejudice, notwithstanding the fact that it is usually impossible for the accused to meet the burden of showing the existence of prejudice in the minds of particular jurors. What was said in Meyer v. Cadawalader, C. C. Pa. 1891, 44 Fed. 32, 36, has application here:

> "It is impossible to say that there is no direct evidence that the jury read these articles. They appeared in daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that going out into the community, they did not see and read these newspaper publications.".

In United States v. Levi, 7 Cir., 1949, 177 F. 2d 833, a conviction was reversed principally on account of prejudicial publicity. The trial jury had been questioned in a group, much as in the instant case, in an effort to establish the purity of their verdict; and the jury had denied in a group, as they did in the instant case on motion for new trial, having read the prejudicial material. The Court said:

> "The government urges that there is no proof that any juror read the newspaper article . . . and further that the record affirmatively indicates that no juror read said article . . . The reproving manner in which the Court questioned the jury would probably cause any juror to hesitate admitting he or she had read the article . . . Nor can we consider

it a harmless error to be disregarded under Rule 52, Federal Rules of Criminal Procedure."

Petitioners believe it was improper to subpoena the jurors and have them testify in chorus in an effort to uphold their own verdict. It is settled law that a juror may not be heard to impeach his verdict. Conversely, then, petitioners believe that a juror, or ex-juror, ought not to be allowed to testify as a government or court witness for an opposite or contrary purpose. If this Court holds that the questioning of the ex-jurors was proper for the purpose of establishing the purity of their verdict, then logic and the law require that in all fairness, they should have been subject to cross-examination.

The Court said: "Let the Jury be sworn as witnesses." Then the Court questioned the ex-jurors not as jurors, but as witnesses; and, when the oath was administered to them, it was not the oath customarily administered to jurors, but to witnesses. The oath was: "You solemnly swear, under pain of punishment for perjury, to tell the truth, the whole truth, and nothing but the truth, so help you God." This oath contemplates and recognizes, as do all the cases in our American and English jurisprudence, that the "truth" is not always, or necessarily, the "whole truth." It is for this reason that witnesses appearing in Court to testify to facts are, as a matter of course and as a matter of right, subject to cross-examination.

It is petitioners' earnest and sincere contention that the questioning by the Court of the ex-jurors as a group, without cross-examination, did not elicit the "whole truth" in this case. The following excerpt from Judge Edgerton's dis-

sent in the case of Welch v. United States, D. C. 1943, 135 F. 2d 465, will serve to bring out the point petitioners are attempting to make:

> "The judge's questions could hardly fail to remind the jury that they ought not to have read anything about the trial. 'Have you read the articles?' was roughly equivalent to 'Have you committed the impropriety of reading the articles?' "

If petitioners' case is to stand or fall on what the jurors said when questioned in a group by the trial judge over petitioners' objection, then petitioners' counsel certainly should have been permitted to personally cross-examine them individually; and the denial of this inherent right to cross-examine witnesses is prejudicial error per se, calling for reversal of the judgment below.

The Court below, in refusing to hold that the publicity engendered by the prosecutor deprived petitioners of a fair trial, relied heavily upon the assumption that "The trial judge exercised scrupulous care and took appropriate action when the matter was called to his attention."

The Court, unfortunately, did not caution the jury at the beginning of the trial not to read newspapers or listen to radio or television broadcasts concerning the case. The cautioning in this respect came too late to anticipate and prevent the error. It is immaterial in this case whether the trial judge spoke ten, or ten thousand cautionary words, for the error was incurable once the newspaper article of January 29, 1957, was seen by at least one juror.

The words of Jackson, J., concurring in Krulewitch v. United States, 336 U. S. 440, 453, have application here:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Judge Frank, dissenting in Leviton et al v. United States 2 Cir., 193 F. 2d 848, had this to say of the "futility" of cautionary instructions:

> "The futility of that sort of exorcism is notorious. As I have elsewhere observed, it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant."

3. Petitioners acknowledge that the statement of petitioner Donnelly need not have ever been reduced to writing, and that his oral spontaneous remarks without legal formalities might well be the best type of confession. However, when the F. B. I. version of what Donnelly said is dictated to an F. B. I. stenographer and presented to Donnelly for signature, and no signature is attached thereto, then certainly there is some obligation upon the prosecution to explain the absence of signature when this document is offered in evidence as the purported free and voluntary act of the accused.

When the prosecution attempted to introduce an unsigned statement, both law and logic required satisfactory explanation of why no signature is attached. The defendant, Donnelly, explained why he did not sign the statement very simply. He said:

> "I refused to sign it because it wasn't true, and there was a lot of things in it that I wasn't sure about, and that didn't — that just wasn't true, and I didn't feel that I was telling the truth by signing it. If I had signed it, I would have been admitting to that, which wasn't true." (R 346)

The unsigned document offered by the government in its case against Donnelly is not a full and correct account of what Donnelly told the agents of the F. B. I. It is, at most a carefully selected group of answers given by Donnelly which were edited and re-written into a narrative text by persons skillfully trained to develop evidence of criminal violations.

When an unsigned statement is offered in evidence it can be offered only as a recordation, or memoranda of the verbal admissions of the party making it. Therefore, it is basic that this memoranda must be authenticated. Now, this statement (dated 26 April 1956) is not a concurrent memoranda made when Donnelly talked to the F. B. I. agents. Special Agent Carson, on direct and cross-examination, acknowledged that he and his partner talked to Donnelly on 25 April 1956 and that he took copious notes of the remarks made by Donnelly, and that on the next day when he, Carson, attempted to reduce this information to writing "no new areas were explored in this second investigation." (R 309.) This can mean that the only correct, proper and legal memoranda of what Donnelly said would necessarily have to be those copious notes taken at the time that Donnelly actually talked.

If there is any theory in law whatsoever that would justify the introduction of the written memoranda made on the day after the F. B. I. took notes on the conversation they held with Donnelly, then it is absolutely mandatory that the government assume the burden of proving that the formalized memoranda or statement is simply a true recordation of that which is contained in the notes. This is not so — the copious notes taken at the time that Donnelly talked to the agents of the F. B. I. include spontaneous utterances that would necessarily establish the innocence of this accused. This is recorded in the original and concurrent memoranda of the F. B. I. These utterances so necessary to the defense of Donnelly are eliminated from the document offered by the government as Exhibit 12. (R 400.)

Counsel for petitioners found out about the existence of these notes only on cross-examination during the course of the trial. Thereafter counsel for the petitioners stated:

> "I am asking the Court to produce the original notes to be compared with what is so called a statement. (R 312).

This request made on January of 1957 is predicated upon counsel's concept of the then existing law of the land. This concept, the right to demand the production of these notes at this state of the proceeding was proven to be correct in law in June of 1957. Jencks v. United States, 1.L. Ed. 2d 1103.

So here we have a situation in which the government attempts to introduce a document (Government Exhibit 12) which by its very nature can be no more than an F. B. I. dictated and typed recordation of what Donnelly told them.

If it is true and correct it is not admissible in evidence as it is not the original and concurrent memoranda. But, it is not true and correct because the concurrent memoranda made simultaneous with the utterances of Donnelly include the positive statement of the Special Agent of the F. B. I. to the effect that Donnelly "didn't know anything of the tap of Mayor's phone," and "didn't know of Lirette and Massicot putting the tap on Morrison." (R. 321)

This statement of the accused spontaneously denying guilt has been deliberately deleted from the formal statement dictated by the F. B. I. almost twenty-four hours after the actual statement had been made. Regardless of any other consideration whatsoever justice demands that if an accused makes a statement to the F. B. I. then the entire statement and only the entire statement can, under proper circumstances, become evidence against him. No one has a right to delete from an accused's statement those portions thereof which may be of help to him in his own defense. Likewise, petitioners know of no authority given to this agency to make a pre-trial determination as to which one of two statements of the accused are to be used as his purported free and voluntary confession.

Petitioners believe that the simple statement of the accused Donnelly that "I refused to sign it because it wasn't true . . ." is of itself ample and adequate reason for the denial of the admission of this unsigned memoranda into evidence. Particularly so in the light of the fact that by legally established means counsel for the appellants on cross-examination produced evidence made simultaneously with the admissions of Donnelly which are contradictory to those

recorded in the document that the government would offer as evidence to secure Donnelly's conviction.

## CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HERVE RACIVITCH
GUY JOHNSON, of
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2206 American Bank Building
New Orleans 12, Louisiana

## PROOF OF SERVICE

I, HERVE RACIVITCH, one of the attorneys for petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on Hepburn Many, United States Attorney for the Eastern District of Louisiana, Federal Office Building, New Orleans, Louisiana. And, the Solicitor General of the United States Department of Justice, Washington 25, District of Columbia, by mailing a copy thereof, "postage prepaid" to the addresses here noted.

HERVE RACIVITCH
2206 American Bank Building
New Orleans 12, Louisiana

## APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 16521

---

SIDNEY J. MASSICOT, ROBERT R. LIRETTE and JAMES F. DONNELLY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

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*Appeals from the United States District Court for the Eastern District of Louisiana.*

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(April 7, 1958.)

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Before BORAH, TUTTLE, and CAMERON, Circuit Judges.

BORAH, Circuit Judge: Appellants, Sidney J. Massicot, Robert R. Lirette, and James F. Donnelly, were tried, convicted, and sentenced on three counts of a five-count indictment charging them with certain violations of the

Federal Communications Act, 47 U.S.C. §§605 and 501,[1] in that they did willfully and knowingly and without authority of the sender intercept and cause and suffer to be intercepted certain telephone communications by and between deLesseps S. Morrison and other named persons, and did divulge and publish and cause and suffer to be divulged and published to one or more persons the existence, contents, substance, purport, effect and meaning of the said telephone communications.

These separate and consolidated appeals from the judgments of conviction raise eight specifications of error. However, before considering these assignments, a brief statement setting forth the uncontroverted facts which were established at the trial would appear in order as background for the discussion and determination of whether there was error in respect to any of the matters complained of.

On January 17, 1956, the date of the Louisiana Democratic primary election, deLesseps S. Morrison, a candidate for governor, was at his home in the City of New Orleans. That evening, following the closing of the polls, he spoke over his residence telephone to several persons in the city, including his wife, David R. McGuire and Claude Kirkpatrick.

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[1] 47 U.S.C. §605 in pertinent part provides: ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ."

47 U.S.C. §501 provides: "*General Penalty*. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful . . . shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both . . ."

One or two days thereafter, appellant Massicot, while in a New Orleans hotel suite then occupied by the successful gubernatorial candidate, Earl K. Long, played back in the presence of at least five persons a tape recording of the aforementioned telephone conversations.

On February 3, 1956, following an investigation by the city police and the telephone company, a wire-tap was found in the terminal box on the service pole in front of the Morrison residence. The tap consisted of a service wire leading into Apartment "G" of an apartment house which was directly across the street from the Morrison residence and it was so connected at the terminal box that calls transmitted or received on the Morrison telephone would be transmitted or received simultaneously on the wire serving the apartment, with the result that such conversations could be overheard by third persons by the use of a telephone or other listening device.

The evidence further shows that Massicot operated the United Detective Agency in the City of New Orleans, that Lirette was a full time employee of the agency, and that in April, 1955, Donnelly had been employed by the agency on a part-time basis. The identity of Massicot as the person who played back the tape recording was definitely established by the testimony of several of the witnesses there present. The owner of the apartment building identified Lirette as the man who, on January 14, 1956, under the name "Sirette" rented and thereafter occupied Apartment "G" for four consecutive nights. This witness further testified that during the period in question, she overheard a conversation between Lirette and another man in which one of them remarked that he was glad the other had brought a recorder.

As to Donnelly, the evidence shows that he was employed by the telephone company from March 14, 1949 to May 1, 1956, as an installer-repairman, but that he was absent from duty during the period January 10 through January 22, 1956. In a statement which he made to agents of the Federal Bureau of Investigation, which was admitted over objection, Donnelly stated that he knew where the Morrison home was as he had previously worked there when there had been trouble with the telephone system; that he knew that Morrison's telephone lines ran directly to a pole in front of his house on which there was a cable terminal; that he climbed this pole and attached the pair of wires leading from Apartment "G" onto the terminal pair serving the Morrison residence telephone; and that thereafter he went into the apartment, checked the wires, and found that the tap was working. Donnelly further stated that prior to the day the tap was installed he made a headset consisting of one earphone with small alligator clips and a condenser, and that the headset was in Apartment "G".

This brings us to a consideration of appellants' specifications of error. Their principal contention, which is the subject matter of specifications Nos. 1 and 8,[2] is that the statute under which they were convicted is merely a rule of evidence and does not define a crime against the United States, and that in any event, as urged in their motion in arrest of

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[2]Specification No. 1. "Denial of the motion to dismiss is an apparent and grave error for the statute under which appellants were convicted does not describe a crime against the United States, but merely defines a rule of Federal Procedure (evidence)."

Specification No. 8. "Refusal of the Trial Court to arrest judgment was error as Congress did not intend that the crime defined by Section 605 of the Communications Act of 1934 should apply to intrastate telephone communications."

judgment, Congress did not intend that the crime denounced by the statute should apply to intrastate communications. We find no merit in either of these assignments. In *Rathbun v. United States*, 355 U.S. 107, 111, the Supreme Court had occasion to consider the second clause of the statute under which appellants were convicted, and in language which is destructive of appellants' contention that the statute does not define a crime, the Court pertinently said: ". . . Section 605 is penal in nature, the first violation being punishable by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both." See 47 U.S.C. §501. And it is clear from the authorities that this clause of Section 605 applies both to intrastate and to interstate communications. *Benanti v. United States*, 355 U.S. 96, 104; *Weiss v. United States*, 308 U.S. 321; *United States v. Gris*, 2 Cir., 247 F. 2d 860. As to appellants' motion in arrest of judgment, we think the trial court was clearly right in holding that it was without jurisdiction to entertain this motion for the reason that the motion was not made "within five days after determination of guilt" and no further time for filing the motion had been fixed by the Court during the five-day period. Rule 34, Federal Rules of Criminal Procedure;[3] *Drown v. United States*, 9 Cir., 198 F. 2d 999; *Marion v. United States*, 9 Cir., 171 F.2d 185, cert. den. 337 U.S. 944.

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[3]Rule 34 of the Federal Rules of Criminal Procedure reads as follows: "The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within five (5) days after determination of guilt or within such further time as the court may fix during the five (5) day period."

Appellants' second and third specifications of error[4] relate to the admissibility of the unsigned statement which appellant Donnelly made to agents of the F.B.I. Counsel first contends that in order to discharge its burden of showing that Donnelly's statement was free and voluntary, it was the Government's obligation to explain the absence of Donnelly's signature thereon and this it failed to do. It is further contended that the statement which was admitted in evidence over objection is not a correct account of what Donnelly told the agents, in that the original and concurrent memoranda made on the date of the conversation between Donnelly and the agents includes spontaneous utterances which were necessary to his defense and which, if included in the written statement, would have established his innocence. The exculpatory statements to which reference is made are that Donnelly "didn't know anything about the tap" on Morrison's telephone, and "didn't know of Sirette or Massicot putting the tap on Morrison." This argument is not at all persuasive. The record shows that Donnelly was questioned first on the afternoon of April 25, 1956, when he was met in a parking lot in the City of New Orleans by two special agents of the F.B.I. At the outset the agents told Donnelly of the nature of their mission and carefully explained to him that anything he said would have to be voluntary, that he was entitled to have an attorney present dur-

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[4]Specification No. 2. "The Trial Court erred in admitting the statement of Donnelly because that statement is unsigned. The lack of signature imposed upon the prosecution an additional obligation of satisfactorily explaining the refusal of the accused to sign—which obligation has not been met by the prosecution."

Specification No. 3. "The Trial Court erred by admitting the statement of appellant Donnelly because it was taken, or attempted to be taken by an F. B. I. Special Agent after that agent had been informed by counsel for Donnelly that he did not want Donnelly to make a statement under any circumstances."

ing the interview, and they advised him of the consequences of making false statements to an agency of the government. During the first ten or fifteen minutes of the interview Donnelly made the aforesaid exculpatory statements and denied knowledge of the wire-tap installation. Then, on Donnelly's suggestion that they have a cup of coffee in order to give him time to "think it over", the three went to a nearby restaurant, and after talking baseball and other unrelated matters, Donnelly informed the agents that he was ready to talk about the case if they would return to the car. This they did, and it was then that Donnelly made the admissions which were included in the statement which was admitted in evidence. At the end of this initial interview, it was agreed that Donnelly would, on the following day, meet with the agents at their office in New Orleans. In accordance with this arrangement, on April 26th Donnelly appeared at the office of the F.B.I. alone, at which time and with his express consent the information he had given them on the previous day was reduced to the form of a written statement. Prior to the dictation of the statement, and upon being again fully advised as to his constitutional rights, Donnelly stated that he did not desire the presence of counsel. Whereupon, and in Donnelly's presence and with his participation, the statement was dictated by one of the agents from notes which he had made during the previous interview. The statement was immediately transcribed by an F.B.I. stenographer and was read by Donnelly who, while admitting that it was true, said he preferred not to sign it until he had an opportunity to show it to his attorney. He was then given a copy of the statement and it was agreed that after he consulted with his attorney he would communicate with the agents and advise t em whether or not he

would sign it. Two days later, on April 28th, one of the agents spoke with Donnelly over the telephone at which time he stated that although the statement was true, on the advice of counsel he did not wish to sign it. The record standing thus, we are in no doubt that the trial judge rightly concluded that the statement was freely and voluntarily made, that the Government had satisfactorily explained why the exculpatory statements were not included therein and why the statement was not signed, and that it was properly received in evidence.

Appellants' additional objection to the admissibility of the Donnelly statement is predicated upon the ground that it was supposedly taken by the F.B.I. agents *after* they had been informed by counsel that he did not wish his client, Donnelly, to make a statement under any circumstances. This contention, which raises a question of fact, is without support in the record. The evidence is all one way and to the effect that Donnelly did not secure the services of an attorney until *after* he was interviewed by the agents and *after* his statement had been transcribed.

Appellants, in specification No. 4,[5] also contend that the court erred in denying their motions for mistrial and for a new trial. These motions were based upon the alleged pre-

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[5]Specification No. 4. "The government prosecutor committed reversible error during the course of this trial by public statements to the effect that the statement of Donnelly '. . . definitely involved the other two defendants, Sidney J. Massicot, operator of the United Detective Agency, and Robert R. Lirette, an employee of the agency.' After the impropitious comment of the prosecutor, which is alleged to have occurred on the second day of the three-day trial, the issue was raised by a motion for mistrial which was denied; and, again, raised by the supplement of additional evidence in a motion for a new trial. The denial of both motions is here alleged as a positive specification of error."

judice resulting from the publication during the progress of the trial of certain remarks made by Government counsel to a newspaper reporter. The uncontroverted evidence which bears on this issue shows that at the close of the Government's testimony, the Donnelly statement was received in evidence only after the court had acquiesced in the request of defense counsel that they be permitted to delete therefrom all references to Massicot and Lirette; and when this statement with these deletions was read to the jury, the Government rested its case. Thereupon, the defendants moved for judgment of acquittal, but because of the lateness of the hour, argument thereon was deferred until the following morning. When the court reconvened and after arguments were had, counsel for defendants moved for a mistrial on the ground that the final edition of a local afternoon newspaper of the preceding day had printed a story in which the Assistant United States Attorney was quoted as stating that the Donnelly statement "definitely implicated all three defendants." Whereupon and after the jury was ordered to return to the courtroom, the trial judge instructed them as follows:

> "At the close of the case on yesterday the Government introduced a statement which the witness testified was made by the defendant Donnelly. You were instructed, and you are instructed again, that this statement may be used as evidence only as to the defendant Donnelly, that it has no bearing whatever and cannot be considered as evidence in connection with the guilt or innocence of the other two defendants, Massicot or Lirette . . ."

Following this admonition, the court then inquired whether any member of the jury had read the newspaper story and, in particular, the comment or quotation attributed to the Assistant United States Attorney. And when in response to this inquiry the court was advised that only one juror had read "part of that article", and that this juror had not read the Government attorney's statement, the court overruled the motion for mistrial. Subsequently, the case was submitted to the jury under instructions which were detailed, clear, and complete. They were told that they should consider only the evidence adduced at the trial,[6] and again admonished that the Donnelly statement could not be considered by them in the determination of the guilt or innocence of the other two defendants on trial. Thereafter, and following the return of the jury verdict, the defendants moved for a new trial based on "newly discovered evidence" which consisted of the texts of radio and television reports which had been broadcast on the second and third days of the trial and which included the following: "Federal attorneys in the current wiretapping trial in New Orleans say they have an alleged confession implicating all three defendants who are on trial for tapping the private home telephone of New Orleans Mayor deLesseps Morrison." A hearing was

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[6]The court instructed the jury in part as follows: "You must take out of your mind anything that you may have heard or read elsewhere than in this court room. You must make certain that every conclusion that you come to results from evidence which you received here in the jury box from the witnesses on the witness stand and from the documents which have been admitted in evidence. Unless you feel that you can do that, unless you feel that you can take out of your mind other considerations which may have come to you from other places, you will be doing a great injustice to one side or the other in this case. You must make certain that every consideration which comes before you in the jury room has come to you from the evidence introduced in this case, from the witnesses or from the documents admitted in evidence."

had and the individuals who had served on the jury were sworn by the court as witnesses, following which the court asked them three specific questions relating to the radio and television reports.[7] All twelve of the jurors answered that they had not heard the broadcasts. The court then inquired whether there was any further question that the defendants would like the court to ask the jury. Defense counsel did not avail themselves of this privilege, but requested that they be permitted to personally cross examine the jurors, which request was refused. We think this ruling of the court was correct, but in any event, no showing has here been made that the defendants were prejudiced thereby. However, the main thrust of appellants' argument, and certainly the one stressed in brief, is that since the jury were never locked up and there was no instruction to them by the court that they should not read, or listen to, or view the news accounts of the trial, it is reasonable to conclude that in some form all of the jurors would notice public reports on the matter under their scrutiny and that the implications and prejudices created by the statement could not be cured by any means other than entering a mistrial or granting the motion for a new trial.

We do not at all agree. While we recognize that the Government attorney did overstep the bounds of proper conduct

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[7]The court asked and received a negative answer to each of the following questions:

"1. Is there any member of the jury who has discussed this case with any representative of the Government or representative of the defendants, or the defendants themselves, since you were discharged?

"2. Is there any juror who heard that 10:00 P.M. broadcast over WWL on January 29th, 1957?

"3. Is there any juror who heard any one of these television news broadcasts by Tiger Flowers on the morning of January 30th, 1957, and that was the third and last day of the trial?"

by inadvertently making a public statement concerning the Donnelly exhibit, what is important here is that the jurors swore that they did not read or know of the prosecutor's statement. Consequently, it cannot be said that the jury or any juror had been improperly influenced or in any way affected by the publication and broadcasts complained of, or that the purity of the trial was destroyed. The trial judge exercised scrupulous care and took appropriate action when the matter was called to his attention and was satisfied to proceed. His discretion does not appear to have been abused. *Shushan v. United States,* 5 Cir., 117 F.2d 110, 116; *United States v. Carruthers,* 7 Cir., 152 F.2d 512; *Reining v. United States,* 5 Cir., 167 F.2d 362, cert. den. 335 U.S. 830.

Appellants further claim that the admission of Donnelly's statement in evidence was prejudicial to Lirette and Massicot in that the portion " 'I accepted part time employment with the United Detective Agency . . .' is the one link that combines all three defendants in a conspiracy to violate the statute." This argument which is raised here on appeal for the first time is not persuasive. When the Donnelly statement was being considered in chambers by the court and counsel, no objection then, or at any time during the trial, was made to the above-quoted reference to the United Detective Agency. Moreover, the record shows that prior to the introduction in evidence of this statement the Government had conclusively shown that Massicot was the owner or operator of the United Detective Agency, and that Donnelly was a part-time employee. Thus, the language objected to did not tend to establish any independent fact, but was merely corroborative of the other evidence.

Finally, appellants urge in specifications Nos. 5 and 7,[9] that the court should have granted their motion for judgment of acquittal for the reason that the record failed to establish that any one of the three defendants had performed both of the essential elements of the crime, *i.e.*, the interception *and* divulgence of a communication; and that, for the same reason, it was error to charge the jury that under the general statute on principals it was not necessary that each defendant actively participate in each element of the offense.

The indictment tracks the language of the statute[10] and charges that the appellants and each of them "did intercept *and did cause and suffer to be intercepted* a telephonic communication . . . and did divulge and publish *and cause and suffer to be divulged and published* the existence, contents," etc. of the said intercepted telephone communication. In its general charge the trial judge quoted in full the

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[8]Specification No. 6. "The statement of appellant, Donnelly, prejudiced the interest of the appellants, Massicot and Lirette. The efforts of counsel to delete portions of this statement prejudicial to the other defendants were ineffective. So were the attempts of the Trial Judge to instruct the jury to disregard the statement insofar as it implicated the other two defendants. Therefore, the introduction of the Donnelly statement into the evidence in this case was prejudicial error."

[9]Specification No. 5. "The refusal of the Trial Court to direct a verdict of acquittal is prejudicial error as the record of the evidence adduced failed to establish that any one of the three appellants was responsible for both the interception *and* divulgence of the communication."

Specification No. 7. "The charge to the jury is erroneous, in that the indictment is predicated on the violation of the Communications Act, 47 U.S.C. §605, and the jury was instructed that under the aider and abettor statute (18 U.S.C. §2) 'It is not necessary that each defendant actively participate in each element of the offense.' "

[10]47 U.S.C. §§605, 501.

general statute on principals, 18 U.S.C. §2,[11] and with reference thereto instructed the jury, in part, as follows:

> "What this statute means is this, that to commit the offense charged in the indictment, it is not necessary that each defendant actively and physically participate in each element of the offense. It is sufficient if pursuant to a plan fully known to him, the accomplishment of which plan would violate Title 47, Section 501, which is a section of the law charged to have been violated in the statute, and the statute is if a defendant wilfully and knowingly commits an act in furtherance of that plan, and the plan is actually accomplished, then the defendant so acting is guilty of the offense as a principal, in spite of the fact that he did not actively and physically participate in all phases of the crime."

We think that the court's charge, when considered as a whole, was adequate and proper. Appellants' contention that the law will not support their convictions unless one or more of them participated in every element of the offense finds no support in reason or the authorities. Here, the Communications Act plainly intends to punish the interception and publication of telephone communications. If one person deliberately procures the interception of a communication through others and then divulges and publishes the

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[11] 18 U.S.C. §2, reads as follows: "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
"(b) Whoever causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

communication so procured, that person is under the statute guilty. To hold that the Act is violated only when an accused *personally* intercepts *and* divulges the communication would compel us to ignore the plain language of the statute, as well as the express holding of the Supreme Court in *United States v. Giles*, 300 U.S. 41. In this case the evidence established without any doubt whatsoever that Massicot personally divulged and published the communications by playing back the recording in the hotel suite. While the evidence did not show that he himself physically intercepted the communications, it showed that he as operator of the United Detective Agency and as the employer of Lirette and Donnelly "caused or suffered" the interception of the communications in question. And Donnelly and Lirette knowingly and wilfully performed their parts in the completed plan. Consequently, Massicot was as fully responsible for the interception *and* the divulgence as if he had performed both acts himself. This being so, the jury were authorized to find that Lirette and Donnelly were principals in the crime as aiders or abetters by virtue of 18 U.S.C. §2. See *Russell v. United States*, 5 Cir., 222 F.2d 197; *McClanahan v. United States*, 5 Cir., 230 F.2d 919; *Winger v. United States*, 9 Cir., 233 F.2d 440.

The judgments appealed from are, therefore,

AFFIRMED.

CAMERON, Circuit Judge: I dissent.

# APPENDIX B

## 47 U. S. C. 605. UNAUTHORIZED PUBLICATION OR USE OF COMMUNICATIONS

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any

part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 605, 48 Stat. 1103.)

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JOHN T. FEY, Clerk

No. [redacted] 79

# In the Supreme Court of the United States

OCTOBER TERM, 1957

SIDNEY J. MASSICOT, ROBERT R. LIRETTE AND JAMES F. DONNELLY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*
MALCOLM ANDERSON,
*Assistant Attorney General,*
BEATRICE ROSENBERG,
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*Attorneys,*
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# In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1041

SIDNEY J. MASSICOT, ROBERT R. LIRETTE AND JAMES F. DONNELLY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals (Pet. 25–39) is reported at 254 F. 2d 58.

### JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1958 (R. 543). A petition for rehearing was denied on May 8, 1958 (R. 571). The petition for a writ of certiorari was filed on June 2, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTIONS PRESENTED

1. Whether 47 U. S. C. 605, which forbids the interception and divulgence of a telephone communication, defines a crime.

2. Whether a statement incorporating petitioner Donnelly's confession, which he admitted was true but did not sign, was admissible.

3. Whether petitioners Massicot and Lirette were prejudiced by newspaper, radio, and television reports to the effect that petitioner Donnelly's confession implicated all of the petitioners.

## STATUTE INVOLVED

47 U. S. C. 605 provides in pertinent part:

> * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *

## STATEMENT

Petitioners were charged with jointly intercepting and divulging three telephone communications, in violation of 47 U. S. C. 605, by an indictment filed July 12, 1956, in the United States District Court for the Eastern District of Louisiana (R. 2–3). Petitioners were found guilty as charged by a jury on January 30, 1957 (R. 474, 477). On February 13, 1957, petitioners Lirette and Donnelly were sentenced to concurrent terms of one year imprisonment on each count. Petitioner Massicot was sentenced to concurrent terms of imprisonment for one year, and a $10,000 fine on count one (R. 490, 506). The Court of Appeals affirmed, one judge dissenting without opinion.

The facts may be stated as follows:

1. Mr. deLesseps S. Morrison, the Mayor of New Orleans, Louisiana, was a candidate for Governor of Louisiana in the 1956 election. On Tuesday, January 17, 1956, the date of the gubernatorial primary election, Mr. Morrison was at home listening to the election returns (R. 22–23, 25). During the course of the evening Mr. Morrison had telephone conversations with Mr. David McGuire (count 2), Mr. Claude Kirkpatrick (count 3), and his wife, Mrs. Corinne Morrison (count 4) (R. 19–20, 23, 27). These particular calls were intrastate calls. The telephone which Mr. Morrison used was his usual residence telephone on which he had often received interstate calls. He did not authorize anyone to intercept them (R. 25, 26–27, 28, 36, 196–197), nor did the other parties to these conversations authorize their interception (R. 46, 57, 63).

On January 18, 19 or 20, 1956, petitioner Massicot played a wire recording of Mr. Morrison's telephone conversations in the hotel suite of Governor Earl Long, the successful gubernatorial primary candidate (R. 69–71, 72–74, 78, 87–88, 93–94). Four to six people were present at the time of the play-back, including Governor and Mrs. Earl Long (R. 76, 78, 100–101). Petitioner Massicot also discussed the method used to intercept telephone communications (R. 75–76).

Within a few days word came back to Mr. Morrison that his telephone had been tapped and that some of his recorded telephone conversations were being circulated (R. 36). Police and telephone company investigation revealed that the Mayor's tele-

phone line had been tapped at the terminal box on the service pole outside the house (R. 147, 172–173, 197). A service wire which had formerly provided normal telephone service through the same terminal box to Apartment G, 1328 Felicity Street—which was diagonally across the street from the Mayor's home—had been shifted so as to funnel Mr. Morrison's telephone calls to Apartment G, as well as to the Mayor's home (R. 174–176, 178, 185–186, 196–200, 220–223).

On January 14, 1956, petitioner Lirette had rented Apartment G, 1328 Felicity Street, using the name "Sirette" (R. 161, 232–235, 251–252). He occupied the apartment for four nights only; that is, until the day after the primary election (R. 237, 239, 245–246). On one occasion during this period, while entering the apartment in the company of another person, either petitioner Lirette or his companion was heard to say, "I am glad you brought the recorder" (R. 236).

During the period of these offenses petitioner Massicot operated the United Detective Agency in New Orleans. Petitioner Lirette was a full-time employee of the agency and petitioner Donnelly a part-time employee. All three had obtained commissions as special police officers from the New Orleans Police Department at petitioner Massicot's request (R. 121–123, 133–138, 148; Govt. Ex. 1–8). Petitioner Donnelly also worked full-time for the Southern Bell Telephone and Telegraph Company as an installer-repairman. He was absent from his regular employment from January 10 through 22, 1956, because of "illness" (R. 261–262, 264–265).

2. During a hearing held by the trial judge in the absence of the jury (R. 296) to determine the admissibility of petitioner Donnelly's confession the following facts were developed:

Petitioner Donnelly was interviewed twice by F. B. I. agents Carson and Griffin, on April 25 and 26, 1956 (R. 270, 297–298). The first interview took place in a parking lot in New Orleans during the afternoon (R. 297). The agents identified themselves and told petitioner Donnelly the subject of their inquiry (R. 329). Donnelly was not placed under arrest and he was informed that he could leave at any time (R. 308). Initially, Donnelly denied having any knowledge concerning the wiretap. After pondering the matter over a cup of coffee, however, he admitted that he had installed the wiretap on Mayor Morrison's telephone (R. 321).

The following day, Donnelly met the agents at the local F. B. I. office (R. 309). He was advised that he had a right to remain silent; that he was entitled to consult an attorney; that he could terminate the interview at any time; and that it was an offense to give a false statement (R. 298, 310–311, 324). Donnelly's oral disclosures of the previous afternoon—as clarified by questions asked of him at the second interview—were then reduced to writing in his presence and with his participation (R. 298, 309–310, 314, 325, 394–395). After the statement had been typed, Donnelly read it and indicated that it was completely true, but declined to sign the statement until after discussing it with his attorney (R. 302–303, 310, 315–316). He mentioned that between the two interviews

he had talked to an attorney about giving a statement and wanted to show the statement to the attorney (R. 335). Donnelly was then given a copy of the statement. Two days later he declined, on the recommendation of his counsel, to sign the document (R. 303, 315). At that time, however, he again admitted that the statement was true (R. 316). No force or threat of physical violence, no reward or promise of immunity, was used to induce the giving of a statement (R. 298–299, 308, 324–325).

Donnelly testified for the purpose of contesting the admissibility of the pretrial statement (R. 341). He testified that the F. B. I. agents told him that he could be sentenced to five years imprisonment if he did not answer their questions truthfully (R. 342–343), and that he refused to sign the statement because there were portions of it "that I wasn't sure about", and other portions that were not true (R. 346). He denied participation in the formulation of the statement and denied that he told the agents that the statement was true (R. 345, 347, 362). Donnelly admitted, however, that he was not mishandled in any way (R. 354); that the agents told him that he was entitled to consult an attorney (R. 343); and that he was told that anything he said could be used against him (R. 345).

The trial judge ruled that the pretrial statement was voluntarily given and admissible in evidence (R. 367). Those portions of the statement which related to petitioners Massicot and Lirette were deleted (R. 368–369), and the expurgated version was read to the jury (R. 400–403, 417).

After the jury had returned to the courtroom (R. 369), the prosecution presented all of the evidence which it had earlier offered on the issue of admissibility (R. 369–393), plus the testimony of the stenographer to whom the statement had been dictated and who had then transcribed the dictation (R. 393, 398). When Donnelly's pretrial statement was offered in evidence, defense counsel objected that the statement was not voluntary and was unsigned, but Donnelly did not testify before the jury (R. 399–400).[1]

3. On January 29, 1956, the second day of trial, the Assistant United States Attorney trying the case gave a statement to a local newspaper in which he said that petitioner Donnelly's confession definitely involved the other two petitioners (R. 414–415). An article incorporating this statement appeared in the newspaper's final edition on that day (R. 414). As of the time when this article appeared, Donnelly's pretrial statement, with references to the other petitioners deleted, had been admitted in evidence and the government had rested its case. (R. 368–369, 402). The following morning defense counsel moved for a mistrial and asked the trial court[2] to interrogate the jurors to learn if they had seen this article (R. 413). The trial judge instructed the jury that petitioner Donnelly's state-

[1] In the course of his instructions the trial judge told the jurors that the agents testified that petitioner Donnelly had made a pretrial statement (R. 419) and that the jurors should satisfy themselves that any admissions in the statement were voluntarily made and then give the statement such weight as they believed it deserved (R. 470).

[2] Defense counsel expressly stated that "Of course, we can't ask the Jury any questions, * * *." (R. 413).

ment could be used only against Donnelly and had no bearing on the guilt or innocence of the other petitioners. Next, he ascertained that only one of the jurors had seen part of the newspaper article and that that juror had not read the statement attributed to the prosecutor (R. 419–420). On this basis, the judge overruled the motion for a mistrial (R. 420).

In support of a supplemental motion for a new trial filed February 6, 1957 (R. 482–483), it was stipulated that the gist of the prosecutor's statement to the effect that Donnelly's confession implicated all three petitioners was repeated in two or three spot news broadcasts over a New Orleans television station between 6:55 a. m. and 8:55 a. m., January 30, 1957, the third and last day of trial. It was also stipulated that this information was included in a news broadcast over a New Orleans radio station at 10:00 p. m., January 29, 1957 (R. 487–489).

The trial court called the former jurors as witnesses at the hearing held on the motion. In response to questions, each testified that he had not heard either the radio or television news broadcasts (R. 492–494). The judge asked defense counsel if they wanted any further questions to be put to the former jurors but denied them permission personally to cross-examine (R. 494–495). The motion for a new trial was thereafter overruled (R. 504).

## ARGUMENT

1. Petitioners' claim that 47 U. S. C. 605 prescribes a rule of evidence and does not define a crime is answered by the statutes. Section 605 provides, *inter alia*, that "no person not being authorized by the

sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person"; and 47 U. S. C. (Supp. V) 501 provides a punishment of fine and imprisonment for any person who does any act prohibited by the chapter of which Section 605 is a part. This Court has neither erred nor spoken inadvertently in concluding, not once but many times, "that Section 605 is penal in nature" and extends "criminal liability to conduct" of the kind shown by this record. *Rathbun* v. *United States,* 355 U. S. 107, 111; *Benanti* v. *United States,* 355 U. S. 96, 102–103; *Schwartz* v. *Texas,* 344 U. S. 199, 201; *Weiss* v. *United States,* 308 U. S. 321, 329; *Nardone* v. *United States,* 308 U. S. 338, 340; *Nardone* v. *United States,* 302 U. S. 379, 381.

Congress, by enacting Section 605, decided that it was a crime to intercept and divulge telephone messages without authorization. Thereafter it was for this Court to say—and it did say—to what extent evidence obtained by officers in violation of this statute would be admissible in federal courts. *Nardone* v. *United States, supra,* 302 U. S. at 382; *Nardone* v. *United States, supra,* 308 U. S. at 340. But this did not make Section 605 any less a criminal statute. It forbids certain conduct, and traditional criminal penalties attach to its breach. *United States* v. *Gruber,* 123 F. 2d 307, 309 (C. A. 2).

In *Weiss* v. *United States, supra,* 308 U. S. 321, 329, this Court held that intrastate as well as interstate communications were protected against interception and divulgence by the second clause of Section 605.

In *Benanti* v. *United States, supra,* 355 U. S. 96, 103–106, it was held that by enacting Section 605 Congress had so preempted the communications field as to nullify a state law purporting to authorize wiretapping by certain persons and under certain conditions. Petitioners' contention (Pet. 11) that, if Section 605 defines any crime, it must be restricted to the interception and divulgence of interstate communications, thus has already been answered by this Court. As noted in *Benanti,* 355 U. S. at 105, "the intercepter cannot discern between the two and will listen to both [intra and interstate communications]", if the protection of Section 605 is not extended to all telephone communications.

2. Contrary to the contention (Pet. 21) that Donnelly's confession was not true, but was only a carefully selected group of answers which were edited and rewritten into a narrative text by the F. B. I. agents, and therefore inadmissible (Pet. 23), there was ample evidence that Donnelly supplied the information set out in the statement, participated in its dictation, made corrections during the course of dictation, read the statement after it was typed, and then admitted that the statement was true (see *supra,* pp. 5–6). There was thus a substantial basis for the trial court's conclusion that the statement was admissible as having been voluntarily given by Donnelly.

When F. B. I. agents Carson and Griffin first met Donnelly on April 25, 1956, they identified themselves and told him the nature of the inquiry. They then asked him specific questions about the wiretap installation. Donnelly at first denied all knowledge of the

matter but requested time to think over the situation. After a respite from questioning he admitted the principal facts which were set forth in the written statement the following day. See the Statement, *supra*, p. 5. Petitioners argue that the agents should have included Donnelly's prior exculpatory statements [3] in the typewritten document, but the agents surely had no duty to record as part of his statement the earlier assertions which he later abandoned.

Essentially, petitioners ask this Court to reevaluate the circumstances surrounding Donnelly's confession and infer that he refused to sign the statement because it was not true. But petitioners were given a full and fair opportunity to show that at trial in the absence of the jury, *United States* v. *Carmignan*, 342 U. S. 36, 38, attempted to do so, and were not able to persuade the trial judge that the government's contrary evidence should be disregarded. There is no occasion to disregard the decision of the trial court which the Court of Appeals affirmed. Cf. *Thomas* v. *Arizona*, No. 88, Oct. Term, 1957, decided May 19, 1958; *Payne* v. *Arkansas*, No. 99, Oct. Term, 1957, decided May 19, 1958; *Brown* v. *Allen*, 344 U. S. 443, 458; *Lyons* v. *Oklahoma*, 322 U. S. 596, 602–603; *Lisenba* v. *California*, 314 U. S. 219, 238.

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[3] Agent Carson took notes during the first conversation with Donnelly and therein included Donnelly's exculpatory statements. Although petitioners give a prominent place in their brief (Pet. 22) to their trial request that the notes be produced, and cite *Jencks* v. *United States*, 353 U. S. 657, they nowhere mention the further fact that the notes were produced by the government (R. 319) and used by defense counsel during cross-examination (R. 320–321).

3. As noted, *supra*, p. 6, all mention of petitioners Massicot and Lirette was deleted from petitioner Donnelly's confession before the confession went to the jury. Later that day a statement attributable to the prosecutor to the effect that the confession implicated all three petitioners appeared in an article in the local newspaper. Interrogation of the jury revealed that one of the jurors had seen the article but none of them had read the statement which came from the government attorney. Several days later, testimony from the jurors called as witnesses on the motion for a new trial developed the fact that none of them had heard the radio and television news broadcasts carrying this statement.

Although petitioners claim (Pet. 14) they were prejudiced by the publication of the prosecutor's statement that the confession implicated all of the petitioners, it is hard to see how this can be so, since none of the jurors saw, read, or heard this statement. See *Thiede* v. *Utah Territory*, 159 U. S. 510; *Spies* v. *Illinois*, 123 U. S. 131; *Hopt* v. *Utah*, 120 U. S. 430.[4] Even where jurors have seen newspaper accounts of a trial in which they have participated, they are not necessarily disqualified. *United States* v. *Reid*, 53 U. S. 360, 366; *Bratcher* v. *United States*, 149 F. 2d 742 (C. A. 4), certiorari denied, 325 U. S. 885; *Beard* v. *United States*, 82 F. 2d 837, 844 (C. A. D. C.), certiorari denied, 298 U. S. 655; *Van Riper*

[4] Since Donnelly's confession had already been received in evidence before any publication of the statement was made, he could not be prejudiced by a bare mention of the confession's existence. The claimed error can at most run only as to petitioners Massicot and Lirette.

v. *United States*, 13 F. 2d 961, 967 (C. A. 2), certiorari denied *sub nom Ackerson* v. *United States*, 273 U. S. 702. The test is whether they can consider the evidence impartially. *United States* v. *Reid*, *supra*, *Reining* v. *United States*, 167 F. 2d 362, 365 (C. A. 5), certiorari denied, 335 U. S. 830. *A fortiori*, if the jury members did not read or hear the various accounts of this statement, there can be no prejudice, for prejudice flowing from newspaper and broadcasting reports cannot be assumed. See *Cwach* v. *United States*, 212 F. 2d 520, 531–532 (C. A. 8).

The trial judge ordered the deletion of all references to petitioners Massicot and Lirette from petitioner Donnelly's statement before the statement went to the jury (R. 368–369). He carefully instructed the jury members that they were "to disregard that statement in so far as the guilt or innocence of the other two Defendants now on trial is concerned" (R. 419). During the course of his general instructions the judge told the jury that "[y]ou must take out of your mind anything that you may have heard or read elsewhere than in this Courtroom. You must make certain that every conclusion that you come to results from evidence which you received here in the Jury Box * * *" (R. 462). Later, the judge repeated his earlier instructions limiting petitioner Donnelly's statement (R. 470). It must be presumed that the jurors followed these instructions. *Delli Paoli* v. *United States*, 352 U. S. 232, 242; *Opper* v. *United States*, 348 U. S. 84, 95.

There is no merit in petitioners' argument (Pet. 18) that the jurors could not be questioned after verdict as to whether they had heard the news broadcasts as to the prosecutor's statement. See *United States* v. *Reid, supra,* at 366; *Higgins* v. *United States,* 160 F. 2d 222 (C. A. D. C.), certiorari denied, 331 U. S. 822; cf. *Mattox* v. *United States,* 146 U. S. 140, 147–148. Nor was it improper for the judge to conduct the examination himself. When qualifying prospective jurors the trial judge is entitled personally to conduct the examination and need not permit defense counsel to do so, so long as counsel are permitted to suggest pertinent questions. Rule 24 (a), F. R. Crim. P.; see *Cwach* v. *United States, supra,* 212 F. 2d 520, 531; *Best* v. *United States,* 184 F. 2d 131, 141 (C. A. 1), certiorari denied, 340 U. S. 939; *Murphy* v. *United States,* 7 F. 2d 85, 86 (C. A. 1), certiorari denied, 269 U. S. 584; *Ungerleider* v. *United States,* 5 F. 2d 604, 605 (C. A. 4), certiorari denied, 269 U. S. 574. This situation was essentially the same since here, as on the *voir dire,* the purpose of asking questions was to determine fitness. The trial court gave defense counsel the opportunity to formulate questions to be put to the jurors (R. 494–495). The way was open for petitioners to raise their "contention of bias from the realm of speculation to the realm of fact". *Dennis* v. *United States,* 339 U. S. 162, 168. They did not choose to do so and should not be permitted to complain now.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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UNITED STATES OF AMERICA

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## REPLY BRIEF TO THE UNITED STATES BRIEF IN OPPOSITION

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**REPLY BRIEF TO THE UNITED STATES BRIEF IN OPPOSITION**

The Government's brief in opposition re-stating the "Questions Presented" (Gov't Br. 1), totally ignores what petitioners' consider to be the principal question presented, viz., whether the interception and divulgence of *intra*-state telephone communications constitutes a crime against the United States. (Question 1 (B), Pet. Br. 2).

The Government, in a single paragraph under the "Argument" section of its brief, discusses this question summarily and cites *Weiss* v. *United States*, 308 U. S. 321, 329, as authority for the proposition that intrastate, as well as interstate, communications are protected by 47 U.S.C. 605 against interception and divulgence. (Govt. Br. 9, 10).

With respect to the Weiss case, it is petitioners' contention that this Court in the Weiss case was concerned with Section 605 only insofar as that statute purported to create a rule of evidence for federal courts, anything said by this Court in that case regarding the intention of Congress, or the power of Congress, to make it a *criminal offense* to intercept and divulge intrastate communications, was mere *dictum*. For, this Court specifically stated in the Weiss case that its decision was "limited" to the question of "whether the trial court properly received in evidence certain intercepted telephone communications." (308 U. S. at page 326).

But if this Court should now agree with the lower Court that the *dictum* in Weiss was binding on that court in the instant case, then it is the petitioners' contention that it is now time for this Court to reappraise the Weiss decision insofar as that decision purports to interpret Sec. 605 as a criminal statute.

Petitioners have no quarrel with the Weiss decision insofar as it holds that intercepted intrastate communications are inadmissible as evidence in federal courts, and it may even be conceded that the Weiss decision correctly holds Sec. 605 penalizes the interception and divulgence of interstate communications by wire or radio; but petitioners do contend that the Weiss decision is erroneous insofar as it purports to hold that it is a criminal offense to intercept and divulge purely intrastate communications. For, as we pointed out at page 11 of our original brief, the general supervisory and administrative authority of Congress to prescribe rules of Federal procedure undoubtedly gives Congress the right to prescribe evidentiary rules for Fed-

eral courts, but this supervisory authority certainly does not confer upon Congress the right to enact criminal legislation.

Whatever authority Congress has to enact criminal statutes with respect to telephone communications must be found in the interstate commerce clause of the Constitution.

Petitioners, in asking this Court to consider overruling the Weiss decision insofar as that decision purports to interpret Sec. 605 as penalizing the interception and divulgence of purely intrastate communications, would submit three main premises:

1. Congress did not intend the phrase "any communication" in the second clause of Sec. 605 to be interpreted literally (without regard to context) to include any and all communications of any nature whatsoever, but intended that the phrase "any communication" should be limited, modified, and qualified by the words "interstate or foreign" and "by wire or radio," which qualifying terms are used, without exception, in all other instances throughout the Communications Act whenever the phrase "any communication" appears.

2. If Congress intended the phrase "any communication," to be interpreted literally so as to penalize the interception and divulgence of purely intrastate communications, the statute thus interpreted would be unconstitutional as exceeding the powers of Congress under the interstate commerce clause of the Constitution.

3. The challenged phrase "any communication," would render the statute bad for vagueness and uncertainty unless the said phrase is held to be limited, qualified and modified by the words "interstate or foreign," and "by wire or radio."

Unless the phrase "any communication" is interpreted in the light of the context, so as to mean "any interstate or foreign communication by wire or radio," the construction would be ridiculous indeed. Or, *reductio ad absurdum*, "any communication", interpreted literally, might include the signal of a player in a baseball game, or the over-the-fence gossip of housewives.

To avoid such absurd construction, the Government will have to concede, and this Court can hardly avoid holding, that "any communication" must be qualified, at least, by the words "by wire or radio." By what reasoning, then, can the phrase "by wire or radio" be supplied from the antecedent context, without including also the phrase "interstate or foreign"? For these two modifying and limiting phrases are found in tandem, invariably, throughout the entire Communications Act as modifiers of "any communication," with the single exception in the second clause of Sec. 605, where the words "any communication" stand alone.

Petitioners demonstrated in the original brief at pages 11-14 how the failure of Congress to include the phrases "interstate or foreign" and "by wire or radio" in the second clause of Sec. 605 was probably inadvertent, in view of the fact that the language was adopted almost verbatim from the old Radio Act of 1927, which Act pertained only to radio communications, all of which are necessarily interstate.

Unless this Court holds that "any communication" as used in Sec. 605 means "any interstate or foreign communication by wire or radio," petitioners earnestly contend that the statute will be too vague, uncertain, ambiguous and broad to meet the constitutional standards of due process. The broad reach of the word "any," and the unlimited field of communications within the purview of "any communication," is patent. The dictionary definition of "any communication" describes communications of such nebulous amplitude that no person could know what communications were intended by Congress to be protected.

This Court said in the case of *Connally* v. *General Construction Company*, 269 U.S. 385, that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ at its application violates the first principle of due process of law."

The "any communication" phrase of Sec. 605 is baffling not only to "men of common intelligence" but also to many learned jurists of extraordinary intelligence. As petitioners pointed out on page 7 of the original brief, the Honorable William P. Rogers, as Deputy Attorney General in 1933, referred to Sec. 605 as "nebulous." As late as November 1939, the Solicitor General of the United States, who later became a Justice of this Court, argued earnestly, albeit unsuccessfully, in this Court that "The Communications Act shows on its face that it was intended to apply only to interstate and foreign communications." *Weiss* v. *United States*, supra, 308 U.S. at page 322. This same view has been held by many able jurists in the lower courts. For instance, the

Court of Appeals for the First Circuit, in the case of *Valli* v. *United States*, 94 F. 2d. 687, at pages 690, 691, said: " . . . the Communications Act applies only to interstate communications . . . It therefore appears by the very terms of the Communications Act . . . it does not apply to the facts of this case, since all the other intercepted telephone messages were intrastate messages and therefore were not subject to the provisions of the Communications Act . . . No provision of the Federal Constitution or of the Communications Act is violated by intercepting intrastate communications."

Indeed, the trial judge himself, in the instant case, on May 23, 1957, recognized the "nebulous" character of Sec. 605 when he made the following significant statement during argument on Motion in Arrest of Judgment:

> "The unfortunate thing about this particular statute is that there is such a sparsity of jurisprudence which can be used as sign posts or guides in determining just what the statute is intended to cover." (R. 519).

It is respectfully submitted that inasmuch as many learned jurists, including the trial judge in this case and at least one Justice of this Court, have differed or been in doubt as to "just what the statute is intended to cover," then the petitioners in this case, as well as other "men of common intelligence," must "necessarily guess at its meaning and differ at its application" (269 U.S. 335).

What this Court said in the case of *Lanzetti* v. *New Jersey*, 326 U.S. 451, 453, has application here: "No one may be required at peril of life, liberty or property to speculate as

to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."

## IMPORTANCE OF THE QUESTION INVOLVED

It is only in recent years that criminal prosecutions have been brought for "wire tapping" under Section 605, although the statute was enacted in 1934. This Court has never yet said, in any case involving *criminal prosecution* for violation of Sec. 605, that *intrastate* as well as interstate communications are covered. This is an important question of criminal law which will arise more and more frequently now that the Government is prosecuting wiretapping, instead of ignoring, condemning or actually perpetrating it as in the past. This is therefore a question which should be re-examined by this Court in the light of changing conditions, changing applications of Sec. 605, and changing policy on the part of Government, so that the lower courts, as well as possible violators and all "men of common intelligence" will know exactly what the statute means, and whether the statute is constitutional as applied to the facts of the instant case.

Respectfully submitted,

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